Senate Bill 1:
A Legislative Chamber of Horrors

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About The Author

John J. Abt is a distinguished Constitutional and civil liberties lawyer who, since 1950, has defended a number of leading Smith Act cases and led the successful legal battle against the registration and other repressive provisions of the McCarran Act. Having obtained his law degree from the University of Chicago in 1926, and after some years in private practice, he held various legal posts in federal government during the New Deal Administration of the 1930's, including Chief Counsel of the Senate Committee on Civil Liberties (LaFollette Committee) and Special Assistant Attorney General in the Anti-Trust Division of the Department of Justice. In the years 1938-48 he was General Counsel of the Amalgamated Clothing Workers of America and of the CIO Political Action Committee, and then, in 1948-50, General Counsel of the Progressive Party. Since then Mr. Abt has devoted himself entirely to cases involving the defense of the Bill of Rights. He was an attorney for the defense in the case of Angela Davis. He is now General Counsel of the Communist Party, U.S.A.

Senate Bill 1 — "A Legislative Chamber of Horrors"

By JOHN ABT

Pending in the 1975 session of Congress is a bill that masquerades as the Criminal Justice Codification, Revision and Reform Act, but which is the antithesis of "justice" and "reform" in the criminal law.

There is no doubt that the present federal Criminal Code—a hodgepodge of provisions enacted over the years—is badly in need of reform. A project to reform it was initiated in 1966 when Congress named a commission that spent six years in preparing a new code. The product of its labors contained too much "reform" to suit then Attorney General John Mitchell (since convicted of Watergate felonies) and the reactionaries of both parties in Congress. So the commission's proposal was junked. To replace it, two bills were offered in 1973—S. 1400, prepared by the Department of Justice under Mitchell, and S. 1, introduced by Senators McClellan (D. Ark.) and Hruska (R. Neb.). After hearings before a sub-committee of the Senate Judiciary Committee, the two bills were consolidated. The consolidated bill has been introduced in the present session of Congress as S. 1 where it awaits further action.

S. 1 is a 700 page chamber of horrors, the legislative embodiment of all the evils of Watergate. It would immunize federal officials from criminal liability for their official misconduct. It would authorize cover-ups of official wrongdoings by shielding them from public disclosure. It would penalize participation in political movements and demonstrative actions of a militant or left character. Finally, the bill would implement Nixon's call for "the punishment of crime without pity" (except, of course, for his crimes and those of his cronies).

Enactment of the bill would mark a further stage in what the Communist Party draft political resolution characterizes as the decay of bourgeois democracy in the United States. This will appear from an analysis of its provisions.

The bill gives federal officers and employees, and anyone acting at their direction, immunity from prosecution for crimes committed in reliance on a written statement by the head of a government agency that the criminal acts were lawful, even though the statement is later

"determined to be invalid or erroneous." This is the doctrine of "superior orders" which the Nazi war criminals offered in their defense and which the Nuremberg Court rejected. It would have immunized all of the Watergate participants whose crimes were committed under the Nixon-Mitchell cover-up that they were legitimate national security measures.

As a companion piece to this, the bill makes it a defense to the prosecution of a federal official that he performed the criminal act with which he is charged in the belief that he had authority to do so, *even if his belief was mistaken.* This defense applies to the use of "deadly force" (the taking of human life) by an FBI agent or federal marshall in making an arrest or to prevent an escape from arrest. To give law officers this defense is to hand them a hunting license for murder. Yet this is proposed in a period when the press, almost daily, reports a shooting by a trigger-happy officer on the pretext that he believed that his victim—sometimes a child and almost always a Black, Puerto Rican or Chicano—was about to use a gun or a knife.

Another section of the bill, in defining the defense of entrapment, authorizes federal agents and their hirelings to engage in criminal activity while acting as provocateurs. The section provides that it is no defense to a person charged with a crime that a federal undercover agent solicited him to commit the crime, used deception in luring him into committing it. provided him with the opportunity to commit it, or gave him a facility without which he could not have committed it. None of this is a defense unless the defendant can prove that he did not have a "predisposition" to commit the crime—that is unless he can show that "an ordinary law-abiding person" (whatever that means) would have fallen for the tactics of the provocateur.

This section codifies a recent 5-4 decision of the Burger Court. The defendant in that case was indicted for manufacturing speed. He proved that he was not only induced to do so by an undercover narcotic agent but was supplied by the agent with an essential chemical ingredient not available elsewhere. The Supreme Court majority rejected this defense, holding that the defendant was required to prove a lack of "predisposition" to commit the crime.

The decision is an open invitation to federal agents, in the words of Justice Douglas, to "become the instigators of the crime, or partners in its commission or the creative brain behind the illegal scheme." The invitation, of course, is not limited to narcotic agents but invites the FBI to entrap unwary political militants as it did when it infiltrated a group of Catholic war resisters, instigated the destruction of

the Camden draft records and provided the burglar tools and truck to do the job.

Congress can and should overturn the decision of the Burger majority by adopting a sensible definition of entrapment. Instead, the bill would freeze the decision into statutory law and prevent a new liberal majority on the Court from changing it.

The bill provides for another form of official misconduct by reenacting the present law permitting wire-tapping and other means of electronic surveillance when authorized by court order. The bill repeats vague language in the present law on which Mitchell relied as authorizing electronic surveillance without court approval of anyone whom the Attorney General suspects of activity endangering the national security. The Supreme Court rejected Mitchell's argument insofar as "domestic security" is concerned but left open the questions whether court approval is required in the case of "foreign powers or their agents" and, if so, what constitutes a "foreign agent." The Watergate disclosures of the bugging of State Department employees, newsmen and others suspected of leaking information to foreigners, led to a Senate bill, supported by Senators Kennedy, Ervin and others, to require court approval for the bugging of foreign as well as domestic activity. S. 1, to the contrary, would leave the government free to continue Nixon's practice.

Back to McCarthyism

A series of sections of the bill are designed to penalize political movements and demonstrative activity of a militant or left nature. The technique here is to phrase the law in such vague and all-inclusive terms as to catch in its net the advocacy of revolutionary change and peaceful protest against governmental policies and actions.

First, the bill attempts to revive the Smith Act, which prohibits advocacy of the overthrow of the government by violence and membership in an organization engaged in such advocacy. The Supreme Court upheld the convictions of the Communist Party leadership for violating this law in a 1951 decision at the height of the anti-Communist hysteria that accompanied the Korean War. It did so only by shelving what had been the established constitutional principle known as the clear and present danger doctrine—that the First Amendment prohibits punishment of the advocacy of violent revolution unless it takes the form of an incitement to action and creates an imminent danger of insurrection. In the calmer times of the post-McCarthy period, the Supreme Court reinstated this constitutional principle

which, to date, has been adhered to by the Burger Court. And since the government, of course, has never been able to prove that the advocacy of the Communist Party creates a clear and present danger of violent revolution, the Smith Act has atrophied.

The bill would turn the clock back to McCarthyism. It does so by prohibiting advocacy which, in the words of the bill, "incites other persons to engage in conduct that then *or at some future time* would *facilitate* the forcible overthrow" of the government. This is a barefaced attempt to pressure the Burger Court into junking the First Amendment once more. On top of this, the bill triples the present Smith Act penalty from 5 to 15 years imprisonment.

The bill also reenacts with "improvements" the 1968 incitement to riot statute under which the Chicago Seven were prosecuted for their part in the demonstrations at the 1968 Democratic Convention. A riot is defined as "tumultuous conduct" by five or more persons that "creates a grave danger of injury or damage to persons or property." This definition requires proof that the danger was "grave," but the threatened "injury or damage" may be insignificant. The 1968 law requires proof that the defendant crossed a state line with the intention of inciting such a "riot," and the conviction of the Chicago Seven was reversed for the lack of this proof. The bill remedies this defect by eliminating the element of intent. It hinges federal jurisdiction on proof that the defendant used the mail, an interstate phone call or interstate travel in the planning or execution of the crime or that the riot obstructs a federal function or occurs in a federal jail. The penalty is three years in prison, increased to seven if the planned riot involves inmates of a federal jail.

Next, the bill makes it a crime for a person to delay or obstruct the "production, repair or delivery" of "any property particularly suited for national defense use" if this is done "in reckless disregard of the fact that his conduct *might* impair the ability of the United States *to prepare for* defense activities." The bill graciously exempts "conduct occurring in the *usual* course of lawful labor strike activity" from this vague and all-embracing prohibition. But picket lines to protest the manufacture of napalm or the delivery of supplies to South Vietnam or of arms to Chile, and innumerable other demonstrative actions, including "unusual" strike activity, fall within it. The punishment is three years imprisonment, increased to seven during a "national defense emergency" which the President is authorized to declare whenever he finds an "actual or threatened *disturbance* of the international relations of the United States."

The bill also provides a three year sentence for creating "a physical interference or obstacle to the recruitment, conscription or induction" into the armed forces. This would make it a federal crime to demonstrate in front of induction centers and recruiting stations, including those on college campuses.

A broader provision punishes by a one year sentence the obstruction of *any* government function "by physical interference or obstacle." The same penalty is provided for obstructing "an official proceeding" —defined to include any hearing before a federal bureaucrat—"by means of *noise,* by means of violent or tumultuous behavior *or disturbance,* or *by any other means.*"

Next, the bill ups the penalty for contempt of Congress—*e.g.,* a refusal to answer questions of the Senate Internal Security Committee —from one to three years. It also broadens the contempt concept by providing the same penalty for the refusal of a person to answer a question asked in any "official proceeding" after a court orders him to do so.

The bill broadens the present offense of "harboring" by making it a crime merely to warn a person that he is being sought for arrest. Sentences for this offense range from one to seven years, depending on the nature of the crime involved. The "harboring" concept is stretched to include warning an alien unlawfully in the country that he is being sought for deportation, for which a one or three year sentence is specified, depending on the circumstances.

It will be noted that crimes in the general category of obstructing a government function are so broadly defined as to be overlapping, so that a single act may well constitute two, three, four or more different offenses subject, at the discretion of a judge, to consecutive sentences.

Legislating Watergates

A third group of provisions of the bill punishes the revelation of "official secrets," extending and giving legal sanction to the doctrine of executive privilege relied on by Nixon for his cover-ups.

One section makes it a crime, punishable by a three year sentence, to disclose classified information to any unauthorized person. This would give every federal bureaucrat authority to prevent disclosure of the contents of a document simply by stamping it "SECRET." As initially proposed in S. 1400, the section precluded the defense to a prosecution for unauthorized disclosure that the information had been unlawfully classified and, in fact, was not of a secret nature. The present bill liberalizes the latter provision, but more in appear-

ance than in reality. It permits a person to defend on the ground of improper classification, but only if before he disclosed the information he had exhausted a complicated and lengthy procedure within the executive branch in an effort to have the information declassified.

Both the original and revised sections run counter to recent action by Congress in amending the 1968 Freedom of Information Act. That act gives any member of the public who requests it access to documents in the possession of the government and provides for lawsuits to enforce access when it is refused. The act excepts from its terms certain categories of documents, including those that are classified. The Burger Court ruled in a 5-4 decision that Congress intended to make a classification conclusive and to preclude the courts from reviewing its propriety. Motivated by Nixon's abuse of executive privilege, Congress amended the act in 1974 to permit such court review. On the advice of the Departments of State and Justice and the CIA, Ford vetoed the amendment. But Congress immediately overrode his veto by thumping majorities in both houses.

Another section of the bill prohibits the disclosure of "national defense information" to an unauthorized person, knowing that it "*may* be used to the prejudice of *the interest* of the United States." "National defense information" is broadly defined to include information which "relates" to U.S. military capability, planning, operations, communications, installations, weaponry or intelligence. A violation is punishable by a seven year sentence, increased to fifteen during a "national emergency."

Overlapping this offense is the bill's revision of the present espionage statute. As now written, it punishes a person who communicates national defense information *to* a foreign government with intent or reason to believe that it *is* to be used to the advantage of that government. The bill abrogates the key provisions of this definition. It makes a person guilty of espionage if he *collects* national defense information "knowing that it *may* be communicated to a foreign power" and that it "*may* be used *to the prejudice of the interest* of the United States." The penalty for violating this vague prohibition is life imprisonment if it occurs during a "national defense emergency" or involves any "major element of defense strategy" or 30 years in other cases.

Four further horrors of the bill require mention.

First is its definition of "criminal attempt," which is punished with the same sentence as the completed crime. The bill makes a person guilty of an attempt to commit a crime if his conduct "indicates his

intent to complete commission of the crime." Moreover, he is guilty even though "it was factually or legally impossible for the actor to commit the crime, if the crime could have been committed had the circumstances been as the actor believed them to be." This comes close to the medieval British law making it a crime to wish for the death of the king.

Second, the bill would abrogate the Supreme Court's "Miranda rule" that the Fifth Amendment prohibits the use against a defendant of any statement made by him while in custody unless he has first been advised that he need not talk, that anything he says may be used against him, and that he is entitled to have a lawyer present, including one appointed by the court if he lacks the funds to retain one. The bill would make failure to give these warnings only a circumstance to be considered by the court in deciding whether the statement was "voluntary" and hence admissible.

Third, the bill would abolish the defense of insanity. Most courts now define insanity as a mental disease which rendered the defendant unable to appreciate the wrongfulness of his criminal act or to resist the impulse to commit it. The bill would make mental disease a defense only if it rendered the defendant unaware of what he was doing or—where intent is an element of the offense—unable to understand its consequences.

Finally, the bill would revive the death penalty for aggravated cases of treason, sabotage, espionage or murder. It attempts to circumvent the Supreme Court decision holding capital punishment unconstitutional where it is left to the discretion of the jury by spelling out in some detail the circumstances under which it may be imposed. Whether or not this approach will meet the Court's objections may be decided in the North Carolina capital punishment case which will be heard this spring.

The hearings on the bill before the Senate Sub-Committee evidenced opposition to its provisions from diverse quarters. The Association of the Bar of the City of New York, one of the country's most prestigious bar associations, issued a report and appeared in opposition to many of the bill's worst features. The American Civil Liberties Union likewise testified against it, and the National Committee Against Repressive Legislation has made it a point of major emphasis. Moreover, the revulsion of the country against Watergate and what it stands for has created a favorable atmosphere in Congress for the defeat of the bill. This is evident from such actions as the passage of the amendment to the Freedom of Information Act over Ford's

veto and the support which has been given to the bill restricting electronic surveillance.

What is lacking is a broad-based campaign to send the bill back to the drawing board for complete revision and "reform" by the House and Senate Judiciary Committees. Special attention needs to be given to alerting the labor movement and organizations of Blacks, Puerto Ricans and Chicanos to the dangers of the bill. There is the belief in some quarters that the bill is so outrageous that it stands no chance of passage and may be ignored. Such thinking dangerously underestimates the potential for fascism in this country. Watergate and Boston are among the signposts that read otherwise, particularly in this period of growing economic crisis. The bill can be defeated, but it would be folly to believe that it is self-defeating. The task of organizing the opposition that can do the job is an urgent one.

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